

**1.) Please explain how the following can be true: If the EWA industry allegedly has no mandatory fees, how did “California find the annual percentage rate (APR) in California was ~330% across the industry?” (quote is taken from the chat during the Zoom meeting on May 31, 2024).**

**TLDR:** California used a different way of calculating APR than the current legal way that APR is disclosed to consumers.

**Detailed answer:** As a legal framework, APR, or Annual Percentage Rate, comes from the Truth in Lending Act (TILA), which is a federal law passed more than 50 years ago. It measures time (the interest cost over a year), and is an appropriate disclosure framework for many longer-term credit products including installment, car, or mortgage loans. APR disclosures for loans include interest and finance charges, expressed as an annual percentage rate, and according to the written text of TILA<sup>1</sup> a finance charge must be “required” or “imposed” for the transaction to proceed. EWA providers earn revenue by a number of methods: expedited transfer fees, interchange, “tips”, or subscription fees. Those are not required as a condition of the transaction. They are opted in voluntarily by the consumer as a premium service, so none are considered finance charges under TILA

APR For credit cards only include interest on carried balances, not on fees. So, for example, many credit cards charge \$10 per transaction for a cash advance, but whether you got a cash advance or not, the disclosed APR would remain the same (~35%). For a loan, if you wanted to have a document overnighted to you instead of mailed, the additional fee for the FedEx would not be included as a finance charge.

Finally, TILA also exempts finance charges under \$5 for transactions \$75 and below, and \$7.50 (~\$30 if indexed to inflation) for transactions above \$75, so even if expediting fees were considered finance charges, nearly all fees in the market today would be exempt from APR disclosure.

Therefore, according to current law on APR, optional fees, and even de minimis finance charges are not required to be disclosed in APR calculations.

In California, industry participants signed a a voluntary MOU<sup>2</sup> with CA DFPI (the financial regulator) to disclose APR in accordance with TILA, the exact language of that agreement is below:

*The Annual Percentage Rate (APR) for the advance pay product offered, if any, as calculated pursuant to Truth In Lending Act (TILA), 15 U.S.C. §§ 1601-1667f methodology. For the avoidance of doubt, subscription fees, voluntary gratuities and transaction fees for expedited delivery of advance pay are not considered “finance charges” for purpose of TILA and thus are not included in an APR calculation.*

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<sup>1</sup> <http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter41-subchapter1&edition=prelim>

<sup>2</sup> <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/01/Admin.-Action-Activehours-Inc.-Memorandum-of-Understanding.pdf>

According to the MOU, the disclosed APR according to TILA is 0%. When DFPI later released aggregated data about the industry, they used a different calculation, which included all payments, whether voluntary or not, which is where the ~330% number comes from. However, if a similar calculation is used for substitutes in the market, you can see that it is actually lower than most other similarly available options.

As APR is a measure of time, rather than cost, it makes any short term transaction look misleadingly expensive.

Liquidity Option for \$100	APR (TILA)	APR (DFPI method calculation)
EWA \$100 with \$3.99 fee for 7 days	0%	208%
Self Help Credit Union Late Fee \$100 with \$5 fee for 6 days	0%	304%
ATM Fee \$100 with \$3.50 fee for 2 days	0%	638%
Overdraft \$100 with \$35 fee for 7 days	0%	1825%

## 2.) Why should or why shouldn't these products be categorized and regulated as a loan?

**TLDR:** Customers are accessing money that is legally theirs, without interest, finance charges, or a legal right to repay, requirements of loan. This does not meet the current definition of loans under federal or most state laws.

**Detailed answer:** New technologies should not be forced into ill-fitting existing regulatory frameworks, just because those are the ones that currently exist. They should be regulated based on the risks and benefits to consumers. For example, rather than asserting Uber needs to get taxi insurance, NCOIL adopted a [Peer to Peer Insurance bill](#), which recognized the differences between ride sharing like Uber and taxis, even though they provide a similar end result to the customer. Planes, trains, and buses similarly provided passengers transport from one place to another for a payment, but each have different regulatory requirements.

EWA transactions have some characteristics of loans, money transmission, and payroll services. However, they do not fit neatly into any one of those categories. The Vermont regulator called it an "oval peg in a round hole" referring to the applicability of Vermont's lending

law. We feel that rather than shoe-horning it into any one of those categories, consumers and providers are best served by creating an EWA-specific category of regulation. We hope to achieve this with the model bill.

Legally, loans are a specific type of contract that have two characteristics, a legal right to repayment and interest or other finance charge, both to protect the lender. EWA has neither. Unlike a loan, we bear all risk of non-payment, and have no mandatory fees. We also do not include characteristics of many loans such as underwriting based on credit scores or reporting non-payment to credit bureaus.

Practically, EWA provides money that is legally yours, and the flow of funds is similar to cashing a check or using an out of network ATM, neither of which are considered loans. They are transactions where funds that are legally due to you, are advanced for a short period of time until the transaction settles. All customers are offered the opportunity to receive the advance of funds free of charge, but many voluntarily opt into receiving the money on an expedited basis, which typically incurs a flat fee.

At a restaurant, if a server works an extra shift, they can take home cash that day. A dishwasher would need to wait weeks to get that same pay for the extra shift. Does it seem fair that he or she would need to take out a loan to get access to that same pay?

#### **Existing federal law:**

As part of the [Payday Rule](#), the CFPB determined that EWA products do not present the risks and harms associated with short-term lending covered by the rule, and accordingly exempted EWA from it. In promulgating the rule, the CFPB explained that businesses that provide advances on a no-fee, non-recourse basis and that rely on a “tips” model, are “likely to be beneficial for consumers across the spectrum.”

#### **Existing state law:**

Nearly all states require a license of businesses that want to make consumer loans. Although the precise triggers vary from state-to-state, state licensing laws typically turn on the loan size, loan interest rate, and other loan terms, including whether the loan is subject to a finance charge or is repayable in installments; or may require a license for any extension of credit to consumers. In addition, some states also separately regulate deferred presentment, check casher, or payday businesses that provide loans secured by post-dated checks or a contract that entitles the holder to debit the consumer’s account for a fee.

As with the Payday Rule, these statutes do not apply to the EWA model. State lending statutes regulate the provision of loans. Loans are arrangements in which a borrower obtains a sum of money (or property) in exchange for a contractual commitment to repay the funds lent (or return the property borrowed). Additionally, state conceptions of loans often contemplate imposition of a fee that is a condition of access to the loan. EWA does not include these elements.

**All five states that have passed EWA laws have defined EWA as its own category, rather than as a loan.** The Attorney Generals of Arizona and Montana have also provided legal opinions that EWA is not considered a loan under the state's lending laws. As part of a rulemaking process, CA has said EWA is a loan, but it is not currently subject to either of its small-dollar lending laws, the California Financing Law, or the California Deferred Deposit Transaction Law, it is a new product that requires a new legal framework.

EWA is not a loan, and should not be regulated as such.

### **3.) Why should or why shouldn't these products be subject to state usury laws?**

**TLDR:** EWA transactions do not include the components of products subject to usury laws, therefore usury laws do not apply to EWA.

**Detailed answer:** EWA transactions would be subject to usury law if they contained the same characteristics as short term loans (finance charges, late fees, recourse, etc.); however, they don't apply because EWA transactions are structured differently than the products regulated by usury laws.

EWA and short term loans often serve the same need, short term liquidity, but have different risks and benefits to consumers, and providers have different business models and incentives. Credit cards, overdrafts, and late fees, also provide short term liquidity and have different risks, benefits, and regulatory frameworks. They are each subject to their own unique regulatory frameworks.

For the same reason that taxis and Ubers, hotels and short term rentals, trains and planes, and any other new technology that provides a similar service to an older technology are not subject to the exact same laws, new technologies like EWA that provide a similar service to an existing technology like loans should be regulated based on risks and benefits to consumers, not on laws that already exist, just because they exist.

State usury laws are written specifically for one type of transaction, and are not a good fit for EWA because of the way EWA is monetized and the downside risks to consumers of EWA are much less than the downside risks to consumers for short term loans.

### **4.) If all state EWA laws require companies to offer a free option, why should the Model be any different?**

We have no concern including a requirement for a free option, and had previously added that requirement to our suggested amendments.

## 5.) When a free option is utilized, how is the EWA product any different than Venmo?

**TLDR:** EWA is similar to Venmo, but has some important differences, including the fact that EWA companies do not take custody of customer funds.

**Detailed explanation:** EWA does have similarities to money transmitters, but differences as well. The current federal bill puts EWA's regulatory framework in Reg E, which is where money transmitters are regulated, and states have typically included EWA regulations in sections where non-lending non-depository financial services like money transmitters are included.

EWA is similar to Venmo in the way it is monetized - free ACH transfer, usually available the next business day; or a fee for debit, available immediately - but the flow and custody of funds are different for the two products. EWA more closely resembles an ATM machine, which is a different type of money transmitter.

Venmo typically holds funds that belong to consumers (e.g. their Venmo balance) in its own account and makes them available to customers to transfer to themselves or other customers; or processes transactions between two customers via their own individual bank accounts.

An ATM company dispenses funds to a customer by advancing the ATM company's money, then being paid back later via a transfer from the customer's bank account, for a fee.

EWA companies advance workers their own funds based on a worker's accrued, but unpaid wages, and are repaid on payday. While the company does incur a charge for this transaction, in the case of ACH transfer, they do not receive any fee for this service.

So, while EWA does contain characteristics of money transmitters, it is more appropriate to be regulated as its own service.

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### **Summary of differences between Industry and Advocates suggested amendments:**

- 1) Is this a loan, subject to usury caps, or does the model bill include other fee caps?
  - a) We've explained above why we do not think that the loan designation or other usury cap laws are appropriate for the model law. While the industry is willing to consider appropriately designed and fair fee caps, we do not believe that they are appropriate for a model bill, and should be considered on a case by case basis.
- 2) APR disclosures:
  - a) The APR disclosures being requested here are not helpful to consumers. APR as a concept is not well understood, especially for such short periods of time. Dollar disclosures are much more relevant to consumers, which is what all states that have passed EWA bills have included.

- b) Creating a new standard for APR disclosures that no other financial service would be subject to, negates any benefit of the ability to compare between products.
- 3) Restrictions on representation of failed transactions:
- a) These restrictions are being suggested with no data to show any need, or even that consumers would benefit. There are currently standards for electronic and payroll transactions that all businesses in America are subject to, and this would create a new standard solely for EWA businesses that is far stricter than any other financial service is subject to with no justification or understanding of unintended consequences.

In all three of these cases, CRL is advocating for arbitrary and more strenuous requirements than its parent corporation, [Self Help Ventures](#) – a multi billion dollar lender, credit card issuer, and investment firm - is subject to. They are presented without evidence of need or effectiveness, nor with any idea about any second order effects on customers that may come with them.

**Detailed explanations of suggested amendments:**

Explanation of industry suggested amendments:

<https://docs.google.com/document/d/1DYEAYdMDoPxd76qRt5SNjCmbPqyWircd/edit>

Industry comments on Consumer Advocate suggested amendments:

<https://docs.google.com/document/d/1SR3r98Ojtd4uBWwY5yVPfmCiVvgKk8WeXskN1CiKHUg/edit>